TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	3
STATEMENT	3
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	13
APPENDIX A – STATUTES	1a
U.S. Constitution – Amendment V	1a
District of Columbia Code, 1957 Edition, Title 1, Section 1-1431 *et seq.*	1a
APPENDIX B – OPINIONS AND JUDGEMENT BELOW	1b
Order of the U.S. Court of Appeals for the District of Columbia Circuit dated April 2, 1975, Denying Petitioners Suggestion of Rehearing *En Banc*	1b
Order of the U.S. Court of Appeals, District of Columbia Circuit dated April 2, 1975, Denying Petitioner's Request for Rehearing	2b
Opinion and Judgment of the U.S. Court of Appeals, Second Circuit dated February 28, 1975	3b
Amended Order of the United States District Court for the District of Columbia, dated June 14, 1973	20b
Order of the United States District Court for the District of Columbia dated July 19, 1973, holding that its Memorandum Opinion involved a controlling question of law permitting the taking of an immediate Interlocutory Appeal	23b

Page

Memorandum Opinion, Judgment and Order of the U.S. District Court for the District of Columbia dated May 15, 1973 ..... 13b, 19b

TABLE OF AUTHORITIES

Cases:

Boyce v. Safeway Stores, Inc., 351 F. Supp. 402 (D.D.C. 1972) 5b

Barry v. Dwen, 483 F.2d 1126 (1973) 12, 13

Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S. Ct. 856, 6 L.Ed.2d 45 (1961) 8, 11

Dodge v. Giant Food, Inc. 160 U.S. App. D.C. 9, 488 F.2d 1333 (1973) 5b

Gerald Brent Fagan v. National Cash Register Company, 157 U.S. App. D.C. 15, 481 F.2d 1115 (1973) 5b

Jackson v. Metropolitan Edison Company, 95 S. Ct. 449 (1974) 3, 5, 6, 7, 8, 10, 11

Landsdale v. Tyler Junior College, 470 F.2d 659, 664 (5th Circuit, 1972) 12

Lindquist v. City of Coral Gables, Florida, et al, 323 F. Supp. 1161 (S.D. Fla., 1971) 12

Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S. Ct. 1965, 32 L.Ed. 627 (1972) 8

Olff v. East Side Union High School District, 402 U.S. 1042 (1972) 12

Public Utilities Commission v. Pollak, 343 U.S. 451 (1952) 6, 8

Richards v. Thurston, 424 F.2d 1281 (1st Circuit 1970) 12

Shelly v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L.Ed. 1161 (1948) 8, 10

BLEE

Page

Stradley v. Anderson, 478 F.2d 188 12

Stull v. School Board of the Western Beaver Junior-Senior High School, 459 F.2d 339 (3rd Circuit 1972) 12

The Civil Rights Cases, 109 U.S. 3, 3 S. Ct. 18, 27 L.Ed. 835 (1883) 8, 10

EED THROUGH

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No.

EUGENE R. BROWN and RONALD A. GRAY,

Petitioners,

v.

D.C. TRANSIT SYSTEM, INC. and WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on February 28, 1975, with the Petition for Rehearing and Petition for Suggestion of Rehearing *En Banc* having been denied on April 2, 1975.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia is printed in Appendix B hereto, infra, pages 13b-18b. The opinion of the United States Court of Appeals for the District of Columbia Circuit is printed in Appendix B hereto, infra, pages 3b-12b. The Orders of the United States Court of Appeals for the District of Columbia Circuit respectfully denying rehearing and suggestion of rehearing *en banc* are printed in Appendix B hereto, infra, pages 1b-2b and are unreported.

JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on February 28, 1975, with suggestions of rehearing and rehearing *en banc* being denied on April 2, 1975, (pages 1b-2b, infra). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1) and Rule 19(1)(b) of the Supreme Court Rules.

QUESTIONS PRESENTED

I. That the Court of Appeals overlooked or misapprehended the law regarding Appellant, Washington Metropolitan Area Transit Authority in failing to determine whether or not its conduct was "private" or "governmental action".

II. That the Court of Appeals misapprehended the law and erred as a matter of law in failing to consider all the criteria in analyzing the nature and character of

BLEED

D.C. Transit System, Inc., in determining the nexus with the "State" or "Federal" body to establish "state action" or "governmental action" subject to due process restraints and that there is a sufficient relationship to establish such nexus pursuant to *Jackson v. Metropolitan Edison*, 95 S. Ct. 449 (1974).

III. The Court of Appeals did err in failing to affirm the District Court holding, that when the Petitioners Eugene R. Brown and Ronald A. Gray, were discharged by D.C. Transit System, Inc., Respondent, for failure to conform their facial hair to the styling required by D.C. Transit Regulation No. 70-67, there was a violation of the Fifth Amendment Rights of Eugene R. Brown and Ronald A. Gray as a matter of substantive due process, and that such violation was extended to Respondent WMATA upon its refusal to reemploy Petitioners and the joinder of Respondent WMATA as a party defendant by Court order and Amended Complaint.

STATUTE INVOLVED

The statutory provision involved is the Constitution of the United States, Amendment V. The section is printed in Appendix A, infra, page 1a.

STATEMENT

By service of summons and complaint dated December 6, 1971, an action was commenced in the United States District Court for the District of Columbia for declaratory relief and to enjoin D.C. Transit System, Inc. from enforcing Regulation No. 70-67 which involved grooming standards for bus

EED THROUGH

drivers. More particularly, the Regulation involved certain guidelines as to the length of a bus driver's hair as well as the growth of mustaches, beards and sideburns. The action had been commenced in the Federal District Court on the basis that the Plaintiff's rights of free expression, due process and equal protection as provided in First, Fifth, Ninth, and Fourteenth Amendments of the U.S. Constitution have been violated as well as discrimination in employment on the basis of sex in violation of Title 7 of the 1964 Civil Rights Act, 42 U.S.C. 2000 e-2 *et seq,* as well as 42 U.S.C. 1981 and U.S.C. 1983.

The Plaintiff's request for a preliminary injunction was denied and the case proceeded on the merits. On January 14, 1973, Respondent herein, Washington Metropolitan Area Transit Authority (herein WMATA), acquired certain assets of D.C. Transit System, Inc. Subsequently, upon the refusal of WMATA to reemploy the Plaintiffs in the case, by Motion, Amended Complaint and Order of the District Court, Respondent WMATA was added as a Defendant on March 12, 1973, and thereafter participated actively.

Subsequently, Cross-Motions for Summary Judgment were filed and hearing and argument heard thereon.

On May 15, 1973, by Memorandum of Decision and Order the Honorable Judge Barrington D. Parker partially granted Plaintiff's Motion for Summary Judgment finding the regulations in question as to both Defendants in the case were a violation of substantive due process under the Fifth Amendment to the Constitution of the United States. The District Court specifically held that there had been sufficient regulatory supervision by the District of Columbia over the past operations of D.C. Transit and the present

operations of WMATA to consider the actions of these bodies to be under color of law. Relief was denied under 42 U.S.C. 1981 and 42 U.S.C. 1983, as well as 42 U.S.C. 2000 e-2. Thereafter, on September 19, 1973, the Defendants filed a Notice of Appeal to the United States Court of Appeals for the District of Columbia Circuit. No appeal was noted by the Plaintiffs.

On February 28, 1975, the United States Court of Appeals for the District of Columbia Circuit reversed the decision of the Honorable Barrington Parker as to both Defendants and Appellants' Petitions for Rehearing or, in the Alternative, a Suggestion of Rehearing *En Banc* were respectively denied by the Court of Appeals on April 2, 1975. The United States Court of Appeals held that substantive due process was not applicable to D.C. Transit System, Inc., on the basis that, under the Supreme Court decision of *Jackson v. Metropolitan Edison Company, supra,* public utility type agencies, privately owned, even though operated under a certificate of public convenience, etc. were not considered to be acting in such a matter as to constitute state or governmental action. The substantive issues relating to the regulation itself were never reached, the United States Court of Appeals concluding that no jurisdiction existed.

REASONS FOR GRANTING THE WRIT

(1) Beginning on Page Two, the Honorable United States Court of Appeals, in its decision, (Appendix B, infra, page 4b), refers to D.C. Transit System, Inc.,

Appellant, thereafter identified as "Transit". The only reference to the Washington Metropolitan Area Transit Authority as a party to the action would appear to be on Page Three of the Decision (Appendix B, infra, page 5b), in footnote 3, where it is quite correctly stated that Washington Metropolitan Area Transit Authority, Appellant (herein WMATA), was created pursuant to an interstate compact, authorized by Public Law 89-774, 80 Stat. 1324, 1966. It is further correctly stated that WMATA acquired certain assets of D.C. Transit System, Inc., as of January 14, 1973, and was not added as a party to the action herein until March 12, 1973. The decision of the Court of Appeals proceeded to conclude that the "exclusive franchise" of D.C. Transit System, Inc., Appellant, lacked controlling significance and that it was a private corporation, privately funded and as such had no different status than is possessed by any corporation organized under the laws of the District of Columbia or one created pursuant to a special act of Congress. While the Court concluded that Transit was subject to regulation by the Public Utilities Commission, the Court found this to be immaterial.

Considering *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952), the Court of Appeals concluded that there was not a sufficiently close relationship between the Federal Government and the actions of D.C. Transit System, Inc. in the present case. Further considering *Jackson v. Metropolitan Edison Company*, *supra*, the Court of Appeals noted the recognition by the Supreme Court that it is often a close question as to whether particular action is "private" or "state action", bringing attention to the fact that the Supreme Court in *Jackson*, *supra*, indicated that the Company

was a privately owned public utility and the fact that it operated under a certificate of public convenience and necessity was not controlling even though such certificate was issued by the Pennsylvania Public Utilities Commission. The Court of Appeals proceeded to indicate that at the time of the discharge of these Appellees, Transit was in precisely the same situation as the Utility named in *Jackson, supra.* The Court further concluded that Transit may be distinguishable from a private employer who has extensive private competition and adopts grooming standards in the interest of keeping up with or gaining ground on that competition but noted that even a public utility with monopoly or quasi-monopoly status has an interest in consumer acceptance of its services and that the utility (Transit) herein by the issuance of a grooming regulation governing its employees does not create a "nexus" with the state necessary for its classification as "state action" subject to due process restraints where, as the Court concluded in the present case, there has been no involvement whatever of an agency of government, federal or "state".

All of the above criteria, reasoning and legal conclusions were applied solely to D.C. Transit System, Inc., and not to WMATA.

The Honorable District Court of the United States in its Memorandum Opinion (Appendix B, infra, page 13b) indicated sufficient regulatory supervision by the District of Columbia over the past operations of D.C. Transit System, Inc. and the present operations of WMATA to consider the actions of these bodies to be under color of state law and ordered the Defendant, Washington Metropolitan Area Transit Authority to reinstate the

I EED THROUGH

Plaintiffs to their former employment with full restoration of seniority. Thus, the Honorable District Court applied its decision and conclusions of law to both D.C. Transit System, Inc. and WMATA.

Assuming, arguendo, that the actions of D.C. Transit System, Inc. and the other facts and circumstances relating thereto do not establish the required "nexus" with the state necessary for the creation of "state action" there is certainly sufficient substance for a conclusion of "state action" or "governmental action" with regard to WMATA. More than acting under a complete monopoly, it is not a private corporation; it is not privately funded and has a completely different status than any other entity organized under the laws of the District of Columbia. It is a public transit authority, not a privately owned Public Utility like Metropolitan Edison or D.C. Transit System, Inc., and it is respectfully submitted that the appropriate "nexus" is established with regard to Respondent, WMATA, pursuant to the argument set forth hereinafter regarding D.C. Transit System, Inc., in view of *Public Utilities Commission v. Pollak, supra, Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S. Ct. 856, 6 L.Ed.2d 45 (1961), *Jackson v. Metropolitan Edison Company*, 95 S. Ct. 449 (1974), *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S. Ct. 1965, 32 L.Ed. 627 (1972), *Shelly v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L.Ed. 1161, (1948) and *The Civil Rights Cases*, 109 U.S. 3, 3 S. Ct. 18, 27 L.Ed. 835 (1883).

(2) In holding the lack of the necessary "nexus" between the actions of D.C. Transit System, Inc. and any governmental agency, federal or "state", the Court of Appeals observed that the existence of an exclusive

BLEED

franchise or monopoly lacks controlling significance as does the regulation of Transit by the Public Utilities Commission which the Court concluded to be immaterial for one reason, being the Commission had exercised no jurisdiction. This amounts to a seriatum analysis of the various factors when, in fact, the appropriate viewpoint should be a cumulative one. First, there is undoubtedly a total complete monopoly without competition based upon an "exclusive franchise" granted by no less authority than the Congress of the United States. In addition, Transit provided an essential public service supplied on a continual basis. Thus, effectively Transit was a private entity exercising powers traditionally exclusively reserved to the government, whether state or Federal. The proof of this lies in the fact that the Transit System is now operated by WMATA which is a transit authority totally public in character created by Congressional Act and based upon a pact between three separate jurisdictions, two of which are states and one of which is, or was, a federal enclave. Moreover, while there was no investigation by the Public Utilities Commission here, and no Order or hearing by the Commission, it is clear that Appellees pursued the only avenues available to them which involved the procedures established by Union-Management agreement. These involved a hearing by an Appearance Committee and the filing of a Grievance with the Union. The result of the first action was discharge from employment and the second was nothing. As well, Petitioners sought the only other avenue available, a complaint with the Human Rights Commission of the District of Columbia which governmental body confirmed Petitioner's rights in

ED THROUGH

holding the Regulation in question invalid. The matter proceeded then to the Equal Employment Opportunity Commission which granted its Right to Sue Letter without other action. Thus, governmental agencies were involved.

(3) WMATA by its very creation and definition is a governmental agency and its actions pursuant to the Amended Complaint in failing to reinstate the Petitioners amounts to "governmental action", particularly in view of the fact that WMATA has participated throughout the proceedings since its acquisition of the operation of the Transit System in the Washington Metropolitan Area including not opposing their addition as parties to the action, answers thereto, and full participation amounting to tacit adoption of the violative regulation in question.

Certainly, as the Supreme Court observed in *Jackson, supra, The Civil Rights Cases, Supra,* affirmed the essential dichotomy set forth in the Fourteenth Amendment, and the Fifth Amendment, between deprivation by the state, and thus the Federal Government, subject to scrutiny under its provisions and private conduct, "however discriminatory and wrongful", against which the Fourteenth Amendment and thus, the Fifth Amendment, offers no shield. In *Shelly v. Kraemer, supra,* the Court declined to interfere with private action by contract or deed but declined to permit the enforcement of any agreement of the type and character therein set forth through the judicial process since such would clearly be "state action". The present situation cannot be described as non-analogous, in which the employer, whether Transit or WMATA will be empowered to use judicial process,

if necessary, to force employees to leave their employment or conform. As the Court further stated in *Jackson, supra,* the inquiry must be whether there is a sufficiently close "nexus" between the state and the challenged action of a regulated entity so that the action of the latter may be fairly treated as that of the state itself. However, the determination of that "nexus" does not reside in any single fact or relationship but in the aggregation of all relevant factors which, as in the present circumstance, whether as to Transit or WMATA, compels a finding of governmental responsibility. The factors cannot be considered sequentially and individually and discarded. They must be considered in a cumulative and aggregate fashion.

With regard to WMATA the factors need not be considered. It is a public agency, not privately funded, not privately organized but publicly founded and funded. It is not just one among many. They were and are the only public transportation system in existence.

In either case, they would not be unlike the situation in *Burton, supra,* since while Transit was a private lessee, in a sense, under certificate of authority by Congress, it operated under public mandate analogous to the publicly owned building in *Burton, supra.* WMATA is even in a stronger sense the government itself and not merely a public utility, privately owned and operated.

The Court of Appeals erred in failing to distinguish, or indicate a lack of distinction between D.C. Transit System, Inc. and WMATA. Alternatively it erred as outlined hereinbefore.

(4) With regard to WMATA particularly, its position is no different from that of the City of Coral Gables,

EED THROUGH

Florida in *Linquist v. City of Coral Gables, Florida, et al*, 323 F. Supp. 1161 (S.D. Fla., 1971).

(5) There is great dispute in the country among the various Courts, both State and Federal, regarding the substantive issues to be reached in this case, once the jurisdictional question is disposed of in favor of the Petitioners. Particularly, the Supreme Court has recently granted a Writ of Certiorari to the United States Court of Appeals for the Second Circuit in the case of *Barry v. Dwen*, 74-1269. In the case of *Barry v. Dwen*, 483 F.2d 1126 (1973), the United States Court of Appeals for the Second Circuit held a regulation, effectively identical to the one in question herein, unconstitutional in violating the due process clause of the Fourteenth Amendment due to the failure to establish a legitimate state interest regarding hair length. The action of the United States Court of Appeals for the Second Circuit was by way of affirmation of the judgment of the District Court without opinion.

The decisions of the Second Circuit Court of Appeals are directly in conflict with the decisions of the United States Court of Appeals for the Eighth Circuit in the case of *Stradley v. Anderson*, 478 F.2d 188. The conflict does not stop there. See *Stull v. School Board of the Western Beaver Junior-Senior High School*, 459 F.2d 339 (3rd Cir. 1972); *Richards v. Thurston*, 424 F.2d 1281 (1st Cir. 1970). See also *Landsdale v. Tyler Junior College*, 470 F.2d 659, 669 (5th Cir., 1972).

Regarding the substantive issue, the Supreme Court itself has not been without controversy. See *Olff v. East Side Union High School District*, 402 U.S. 1042 (1972) (Douglas J., dissenting from denial of Certiorari). Thus, the present case is companion in substance

to *Barry v. Dwen, supra,* which is presently pending for hearing before the Supreme Court. Moreover, based upon the present status of the law and the decision of the United States Court of Appeals for the District of Columbia Circuit, we now have a peculiar situation in which the jurisdictional question involving such Transit Authorities as WMATA remains unidentified and undelineated.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Dated: July 1, 1975.

Respectfully submitted,

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